In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1697

MARVIN ALLEN SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that he was entrapped as a matter of law, that the evidence was insufficient to support his conviction, and that the district court erred in denying his request for a lesser-included offense instruction.

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of possession of amphetamine and biphetamine capsules with intent to distribute them, in violation of 21 U.S.C. 812 and 841. He was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (Pet. App. A5). The court of appeals affirmed by order (Pet. App. A9).

The evidence showed that on three separate occasions during the early months of 1971, one Elmer Johnston, after receiving a $4000 advance from petitioner, drove

to Mexico and purchased approximately 40,000 amphetamine capsules, which he delivered to petitioner in Knoxville, Tennessee (Tr. 11-20; Pet. App. A18-A22). Returning from a fourth trip to Mexico on June 19, 1971, with benzedrine tablets and biphetamine capsules concealed in the door panels and above the heater of his truck, Johnston was apprehended by Customs agents in Elsa, Texas (Tr. 20-23; Pet. App. A22-24).[1] Johnston offered to assist the agents and stated that he had intended to deliver the drugs to petitioner in Knoxville, Tennessee (Tr. 47; Pet. App. A36). The agents requested that Johnston continue his trip and make the planned delivery (Tr. 23-24; Pet. App. A24). The Customs officers retained a sample of each of the two types of drugs and packed the remainder—about 51,000 benzedrine and biphetamine tablets—into a suitcase (Tr. 25, 40; Pet. App. A24-25, A32-A33).

Accompanied by Customs agents, Johnston drove north to Tennessee. From Memphis, Johnston placed a telephone call to petitioner to advise him that he would soon arrive in Knoxville (Tr. 25-26; Pet. App. A25). With the suitcase containing the drugs in the front seat of the truck, Johnston and one agent drove to a Knoxville gasoline station. Another agent and various local law enforcement officers drove to the rendezvous in a government vehicle and took a nearby position to conduct surveillance. Johnston telephoned petitioner and stated his location; petitioner agreed to meet him. Petitioner presently arrived in a dark-colored Ford automobile, and after several minutes of conversation,

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[1] Prior to testifying at petitioner's trial, Johnston was convicted upon a guilty plea in the United States District Court for the Southern District of Texas for his possession of the drugs (Tr. 30-31; Pet. App. A27-A28).

Johnston delivered the suitcase to petitioner, who put it in the Ford (Tr. 27-29; 48, 49; Pet. App. A26-A27, A37).

Petitioner then drove away; the agents pursued and eventually overtook him. Agent Wilkins was able to identify petitioner as the occupant of the Ford (Tr. 50-52; Pet. App. A38-A39). Then, petitioner suddenly put his car into reverse, backed away from the agents' vehicles and started foward, jumped a median strip, and entered a nearby expressway, traveling in the wrong direction. Despite shots fired at the engine and tires, the agents were unable again to overtake the Ford. Petitioner subsequently surrendered to the authorities. The drugs were not recovered (Tr. 52-54, 100-101; Pet. App. A39-A40, A64).

1. Petitioner argues that the government involvement in the delivery of the drugs in the instant case constituted entrapment as a matter of law. However, as this Court reaffirmed last Term in *United States* v. *Russell,* No. 71-1585, decided April 24, 1973, the defense of entrapment is properly raised only when the criminal design is implanted by a government agent in the mind of one not otherwise predisposed to commit the offense. *United States* v. *Russell, supra,* slip op. at 13. See also *Sorrells* v. *United States,* 287 U.S. 435. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." (*Id.* at 441).

The facts of the instant case do not show that government inducement was required to implant the criminal design in petitioner's mind. Prior to any government involvement in the incident, petitioner had enlisted Johnston's assistance in procuring the drugs and

was awaiting delivery. The government did not induce the commission of the crime, but merely permitted events to take their expected course. In declining to halt the commission of an offense already in progress, the government laid a trap, not for the "unwary innocent," but only for the "unwary criminal." *Sherman* v. *United States*, 356 U.S. 369, 372.[2]

2. Petitioner challenges the sufficiency of the evidence to sustain his conviction. The facts stated above, however, demonstrate strong direct and circumstantial evidence that petitioner in fact knowingly ordered, awaited, and accepted delivery of a suitcase containing some 51,000 biphetamine capsules and benzedrine tablets. Moreover, since he had "counsel[ed], command[ed]. induce[d] and procure[d]" Johnston's possession of the pills, petitioner was a principal party to the transaction and was criminally liable for that possession under 18 U.S.C. 2. He was not guilty of merely "associating" with the person in possession. Thus, petitioner's reliance on *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9), certiorari denied, 371 U.S. 930, and *United States* v. *Hernandez*, 290 F. 2d 86 (C.A. 2), is unavailing. Viewing the evidence most favorably to the government, it is clear that the jury's verdict and petitioner's conviction must be sustained. *Glasser* v. *United States*, 315 U.S. 60, 80.

3. Petitioner also contends that he was entitled to a jury instruction regarding the lesser-included offense of simple possession of the contraband drugs. Such an

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[2] In any event, petitioner is not entitled to claim a defense of entrapment, since the defense presented at trial was alibi (Tr. 124-130, 158-170), and when the court began to charge the jury on entrapment, petitioner specifically waived the instruction (Tr. 186-188).

instruction, however, must be justified by the evidence in the case. *Berra* v. *United States,* 351 U.S. 131, 134. "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed factual element* which is not required for conviction of the lesser-included offense." *Sansone* v. *United States,* 380 U.S. 343, 350 (emphasis added). See also *United States* v. *Sinclair,* 444 F. 2d 888 (C.A. D.C.). On this basis, petitioner would have to claim that his possession of the drugs, if proved, was solely for his own use. Cf. *Sansone* v. *United States, supra,* 380 U.S. at 352-353. As petitioner concedes, however (Pet. 8), his motive for possession was not put in issue at trial. To allow petitioner the benefit of a lesser-included offense instruction unwarranted by the evidence would, in effect, permit the jury to determine petitioner's punishment as well as his guilt. *Berra* v. *United States, supra,* 351 U.S. at 135.

In any event, even in the absence of any evidence concerning the normal amphetamine dosage or whether petitioner himself used the drugs, the only rational inference to be drawn from the unexplained possession of 51,000 pills is that petitioner intended to distribute them, especially in view of evidence that petitioner on three prior occasions in recent months had ordered and received similar quantities. See *United States* v. *Mather,* 465 F. 2d 1035 (C.A. 5), certiorari denied, 409 U.S. 1085. See also *Turner* v. *United States,* 396 U.S. 398, 422-423. "[T]he determination of what is fairly inferable from the evidence must be based on reason, calling on the understanding imparted by experience." *United States* v. *Sinclair, supra,* 444 F. 2d at 890.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

DOJ-1973-08